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OGC Has Reviewed

Prepared by [redacted]

STATINTL PROBLEMS OF DEFAMATION IN CONNECTION WITH [redacted] PUBLICATIONS.

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The question is raised by [redacted], of the STATINTL [redacted], as to whether there might be a liability either to CIA or to [redacted] under the laws STATINTL of defamation should libelous statements be republished in the course of reproduction of monitored broadcasts. The right to sue the United States for tort claims is controlled by the Federal Tort Claims Act of 1946. However, the provisions of this law specifically exclude any claims arising out of libel or slander (28 U.S.C.A. 943 h). Therefore, the question arises as to whether the Director of Central Intelligence or any of his subordinate employees could be held personally liable in an action arising out of defamatory statements pub- STATINTL lished by the [redacted] in the United States. The question of such a possibility in [redacted] should be explored by STATINTL the STATINTL [redacted]

In order to determine possible personal liability on the part of CIA officials, a study of the laws of defamation is set forth herewith. It should commence with a definition of terms so that a full understanding of the problems may be had.

Defamation is an attack on the reputation of another by false publications tending to bring one

into disrepute, tending to lower one in the estimation of the community, and tending to bring one into disgrace and dishonor. Defamation includes the concept of injury to reputation by calumny and aspersion by lying. The publication may be by the spoken or the written word.

Libel and slander are methods of defamation, the former by the written, the latter by the spoken word.

Slander is defamation by spoken words which tend to prejudice the reputation, office, trade, business, or means of getting a living of another. Action for slander is not considered in this paper, as the [redacted] publications are written and not spoken ones. [redacted]

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Libel is a malicious publication expressed in printing or writing or by pictures, tending to blacken one's reputation and to expose one to public hatred, contempt or ridicule. In its ~~most generous~~ broadest sense, it may be said that any publication that is injurious to the reputation of another is a libel. A writing within the law of libel is not limited to manuscripts and books; it can include shorthand notes, provided what is so written is intelligible to the reader; it can also include the teletyped [redacted] reports which arrive and are posted in the office.

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Everyone has the right to enjoyment of good reputation, of which no one may be deprived through falsehood

and malice without liability therefor. Published Written words ~~which are published~~ are ordinarily actionable per se as libelous if they tend to expose a person to public hatred, contempt, ridicule, aversion, or disgrace; induce an evil opinion of one in the minds of right-thinking persons and deprive one of their friendly intercourse in society; injure one in his profession, trade, or business, including imputing lack of knowledge, skill, or capacity to conduct a business or occupation, want of integrity, competence or fitness; professional injury including both office and employment, not only of public officers but also officers and employees in private business; an attorney in his profession; imputing malfeasance or misfeasance in office, neglect of official duty, or similar charges which would engender loss of public confidence; showing want of integrity or capacity as a public official, ~~or~~ employee, ~~or~~ judge, members or candidates of legislative bodies; political corruption or bribery; imputing crime, fraud, dishonesty.

Action for libel undertakes to grant redress for all of the injurious consequences inflicted by the defamatory words. It is generally considered to be more serious than slander because of the permanent record made and the greater circulation usually afforded the libelous statements.

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Examples of possible libelous statements often appear in [redacted] reports. A casual examination of one issue -- the European Section of the [redacted] report for Thursday, STATINTL

28 October 1948 -- yields several possible examples. ~~While no attempt has been made to check on these statements for truth which would be a defense to the publication,~~ they are cited as concrete examples of that type of libel mentioned above, publication of which is libelous per se, and would be actionable if the victims should ever attempt to bring suit.

On page AA 8, Premier Ashida was characterized as follows:

> "Ashida added to his glory as incarcerator of the Japanese people the glory of thieving Premier."

His Ministers were characterized as -

> "stealing from the Nation."

On page AA 9, Premier Yoshida is reported in the press to have -

> "received some time ago a large bribe from the mine owners so that his party should hinder the establishment of State control over the mines. And so the place of the bribe-receiving Democrat, the agent of instilling the pattern of Western European 'democracy,' has been taken by the usurious Liberal."

On pages EE 4 and 5 is the text of a broadcast charging a councilor of the Yugoslav Legation in Budapest with mismanaging the financial affairs of the Legation. The text goes on to state -

> "Upon leaving the Legation, Brankov stole 30,000 forints and 500 dollars and took away with him two Legation automobiles. His accomplices in this theft were an employee of the military mission, Vidovic, and an employee of TANYUG's office in Budapest, Ozren Krstonosic."

Page JJ 1 describes the findings of an American engineer named Rawlings regarding raw materials in Denmark's subsoil as "a fraud". A Danish Minister is quoted as saying that Denmark and the Danish-American Prospecting Company "had been the victims of a swindle by Rawlings."

It should be noted in the definition of libel above that it is a malicious publication. The use of the word "malice" or "malicious" is a legal fiction and does not impute motives of ill will with intent to injure; it is used in a technical sense to denote the absence of lawful excuse or the absence of a privileged occasion. Malice is presumed in libel even though the statement was published with an honest purpose or belief, or with good faith or motives, or by accident or inadvertence.

Malice may also be used in the law of libel as a term involving some intent of the mind or heart, actuating ill will, spite, wanton disregard, or motive to injure. Such malice is never presumed, but must be proved. On the other hand, implied malice, as described above as presumed to exist from unprivileged publication of defamatory words, is actionable per se.

In order to be defamatory, there must be a publication or communication of defamatory matter to a third person or persons. Where defamatory matter is republished by a person other than the original author, the author is not responsible ~~therefor~~ for the republication. The republisher, although not responsible for the primary publication, is

liable for the consequences of the subsequent publication which he makes or participates in making.

A privileged publication or communication is one made bona fide by a person who has an interest in the subject matter to one who also has an interest in it. Privilege is either absolute or qualified.

In order to create liability for defamation, there must be an unprivileged publication of false and defamatory matter about another which is actionable in and of itself.

Absolute privilege is one for which, by reason of the occasion on which made, no remedy is provided.

Qualified or conditional privilege is a defamatory publication on an occasion of privilege without actual malice. Allegations that improper motives prompted the defendant to act will serve to bring the latter into court. See: Glass v. Ickes, 117 F. (2d) 273 (C.A.D.C., 1940).

The privilege may be lost where the manner in which it is exercised goes beyond what the occasion demands. Unnecessary defamation, which goes beyond the requirements of duty, even though acting in good faith, may not claim duty as a defense. Under such conditions, the privilege may be lost.

In communications between executive officers, statements relevant to matters within their scope of duty are absolutely privileged.

All relevant statements contained in a communication made by an executive officer with reference to matters committed by law to his control or supervision,

Allegations of malice are of no consideration as to the right of a public official to argue against a suit [illegible]

and directed to the particular person or persons specially interested in such matters, are within the protection of absolute privilege.

A report by an officer to his superior, made in due course of duty, including everything therein pertinent to the matter reported, is absolutely privileged.

The absolute privilege which protects an executive officer in respect of statements made in line of duty or which have more or less connection with the general matters committed by law to his control or supervision extends to statements issued for publication and published in the press, where the press is reasonably employed as a means of bringing the statements to the attention of the persons specially interested in them.

It is fair to conclude, however, that the unnecessary use of the public press for an official communication, and the resultant publication of damaging statements to many persons not having such an interest as justifies the communication to them, would be regarded as beyond the protection of the officer's absolute privilege.

As stated in the Ickes case, supra, a cabinet official "is within his official right or prerogative, hence absolutely privileged, in informing persons having business with his department of official action affecting such business, together with relevant explanation thereof." (at p. 280).

The Supreme Court of the United States has determined (Spalding v. Vilas, 161 U.S. 483 (1896)) that heads of Executive Departments have immunity from civil suits for damages from acts done by them -

> "when engaged in the discharge of duties imposed upon them by law."

A distinction is drawn -

> "between action taken by the head of a Department in reference to matters which are manifestly or palpably beyond his authority, and action having more or less connection with the general matters committed by law to his control or supervision."

In this case, which was an action in defamation against the Postmaster General over a circular distributed by the Third Assistant Postmaster General at the direction of the Postmaster General, the Supreme Court, speaking through Mr. Justice Harlan, laid down the rule that:

> "Whatever difficulty may arise in applying these principles to particular cases, in which the rights of the citizen may have been materially impaired by the inconsiderate or wrongful action of the head of a Department, it is clear -- and the present case requires nothing more to be determined -- that he cannot be held liable to a civil suit for damages on account of official communications made by him pursuant to an act of Congress, and in respect of matters within his authority, by reason of any personal motive that might be alleged to have prompted his action; for, personal motives cannot be imputed to duly authorized official conduct. In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive

> branch of the government, if he were subjected to any such restraint. He may have legal authority to act, but he may have such large discretion in the premises that it will not always be his absolute duty to exercise the authority with which he is invested. But if he acts, having authority, his conduct cannot be made the foundation of a suit against him personally for damages, even if the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals." (At pages 498-499).

The ruling in the Vilas case that a departmental head is absolutely privileged from liability for defamatory statements made "more or less in connection with the general matters committed by law to his control or supervision" was further approved in the case of Glass v. Ickes, 117 F.(2d) 273 (C.A. D.C., 1940) cert. den. 311 U.S. 718. This was a defamation action against Harold Ickes, the Secretary of the Interior, based on an allegedly libelous press release issued by Mr. Ickes, in which he made a general announcement that Glass, a former employee of the Department, was barred by Department regulations from practicing before agencies charged with the enforcement of the Connally Hot Oil Act, and explaining the regulation's purpose and its application to Glass.

The question before the Court was whether Ickes' communication was privileged to the extent that it could not be the subject of an action for libel. Glass contended that this privilege applied only to communications between governmental officials and not to those from an official to the general public. Speaking for the Court, Judge Vinson stated:

> "It may be that there are circumstances under which an official would exceed his prerogative in issuing a particular communication to the

> press. There are clearly other circumstances, however, when a department head may properly issue public statements in his official capacity. The question to be answered when an action for libel is brought on the basis of such a communication is simply whether the executive officer was within his official prerogative or duty in issuing it. More broadly -- was the public communication 'official' in character?" (At pages 277-278).

After consideration of this question, the Court rules that to communicate information respecting Glass' capacity to the indefinitely large group of persons with rights subject to the Hot Oil Act was a proper announcement, if not essential.

In a concurring opinion, however, Chief Judge Groner points a limiting word of warning:

> "The necessity of the rule is obvious, but its cloak of absolute immunity offers such far reaching opportunity for oppression, that it manifestly ought not to be extended beyond the impulse that gave it being. . . .we may have extended the rule beyond the reasons out of which it grew and thus unwittingly created a privilege so extensive as to be almost unlimited and altogether subversive of the fundamental principle that no man in this country is so high that he is above the law." (At pages 281-282).

See also: Mellon v. Brewer, 18 F.(2d) 168, (C.A. D.C., 1927) cert. den. 275 U.S. 530, where a libel action was brought against Secretary of the Treasury Mellon on the basis of a letter written by the Secretary to the President and released to the press. The Secretary's absolute privilege was upheld.

The absolute privilege granted to the heads of Executive Departments has been extended to subordinate departmental officials.

In the leading case of De Arnaud v. Ainsworth, 24 Appl. D.C., 167 (1904), the plaintiff sued over an alleged defamatory report regarding plaintiff rendered to the Secretary of War by the defendant, a colonel who was Chief of the Record and Pension Office of the War Department.

The action was brought against Ainsworth in his private, individual character and without reference to his official duties or positions. The Court stated in this connection that:

> ". . .this can make no difference so far as his right of defense is concerned. It is sufficiently shown, in fact conceded, that the defendant was a colonel in the regular army, and was duly appointed to and held the position of chief of the record and pension office, and that it was in that character that he made the report to the Secretary of war of which complaint is made." (At page 176).

The Court took the position that as Colonel Ainsworth was the duly appointed official to make the investigation and report to the Secretary for action of the President -

> ". . .the same reason applies for the privilege of the report that would apply if the investigation and report had been made by the Secretary in person. . . .
>
> "The question of motive, or whether there was a want of good faith on the part of the defendant, in making of the report, is not a material question in the case. A party is not liable for the motives with which he discharges an official duty; nor is he liable for any mistake of fact he may commit in the course of the

exercise of that duty. Public policy affords absolute protection and immunity for what may be said or written by an officer in his official report or communication to a superior, when such report or communication is made in the course and discharge of official duty. Otherwise the perfect freedom which ought to exist in discharge of public duty might be seriously restrained, and often to the detriment of the public service. Of course, when a party steps aside from duty and introduces into his report or communication defamatory matter wholly irrelevant and foreign to the subject of inquiry, a different question is presented. . . ." (At pages 177 and 178).

The Court further stated that -

"There is no reasonable foundation for the contention that, because the defendant was not at the head of the War department, therefore his report was not entitled to the privilege that would attach to a similar report made by the Secretary of war.

". . . And, as it is impossible for a single individual to perform in person all the various duties assigned to the particular department of which he is head, he must of necessity, under proper orders and regulations, perform the larger portion ~~kx~~ of such duties through the agencies of the heads of bureaus and divisions of his department. But the work when done is, in contemplation of law, the work of the department, and is entitled to all the privilege and protection that would attach to it if done by the Secretary in person. It is, therefore, not the particular position of the party making the report or communication that entitles it to absolute privilege so much as the occasion of making it, and the reasons of public policy for the immunity." (At pages 180 and 181).

See also: Farr v. Valentine, 38 App. D.C. 413 (1912).

Similarly, in the case of United States, to Use of Parravicino v. Brunswick, 69 F.(2d) 383 (C.A. D.C., 1934), suit was brought by plaintiff, as importer in the Barbados,

in the name of the United States against Brunswick, the American Consul in the Barbados, and his surety alleging violation of the Consul's duty to make truthful, accurate and impartial reports to the State Department. Plaintiff alleged that Brunswick's report had been defamatory as to plaintiff's reputation and credit. It was further alleged that the State Department transmitted the report to the Commerce Department, which in turn disseminated it among various American business concerns. The report was transmitted to the Secretary of State for lawful governmental purposes. Under such conditions, the Court held that the Consul enjoyed an absolute privilege and could not be made to answer in an action for libel based upon his report.

On the authority of De Arnaud v. Ainsworth, supra, plaintiff's contention was rejected that absolute privilege is granted only to the chief officers of the government and not to declarations of subordinates.

A further case is that of Cooper v. O'Connor, 99 F.(2d) 135 (C.A. D.C., 1938), a suit for malicious prosecution brought against the Comptroller of the Currency of the United States, his deputies and certain members of the general counsel's staff of the Treasury Department. They were sued individually and not as officers and employees of the United States. The plaintiff contended that when public officers act outside the scope of their authority, or in a wanton, malicious, and unlawful manner, they are liable in damages. In denying this contention, the Court stated that the immunity rule would apply whether the defendants were accused severally, jointly, or in terms of a conspiracy, so long as each was proceeding within the scope of official duties.

Cooper v. O'Connor, 99 F.(2d) 135, U.S.C.A., D.C. 1938

This was a suit for malicious prosecution brought against the Comptroller of the Currency of the United States, his deputies and certain members of the general counsel's staff of the Treasury Department. They were sued individually and not as officers and employees of the United States. It was contended that when a public officer acts outside the scope of his authority or in a wanton, malicious and unlawful manner, he is liable in action for damages. The Court pointed out that -

> ". . .if the act complained of was done within the scope of the officer's duties as defined by law, the policy of the law is that he shall not be subjected to the harrassment of civil litigation ~~or be liable for civil litigation~~ or be liable for civil damages because of a mistake of fact occurring in the exercise of his judgment or discretion, or because of an erroneous construction and application of the law." (At page 138).

The Court stated further '

> "It is not necessary -- in order that acts may be done within the scope of official authority -- that they should be prescribed by statute . . .; or even that they should be specifically ~~de~~ directed or requested by a superior officer. . . .It is sufficient if they are done by an officer 'in relation to matters committed by law to his control or supervision' . . .; or that they have 'more or less connection with the general matters committed by law to his control or supervision'. . .; or that they are governed by a lawful requirement of the department under whose authority the officer is acting." (At page 139).

". . .But, although the courts were reluctant to recognize and extend the exception, it is now generally recognized that, as applied to some officers at least, even the absence of probable cause and the presence of malice or other bad motive are not sufficient to impose liability upon such an officer who acts within the general scope of his authority. . . .Hence, the officer is entitled to the protection which the law throws about him, not because the law is concerned with his personal immunity but because such immunity tends to insure zealous and fearless administration of the law." (At page 140).

"But whatever these considerations may indicate as to the wisdom of legislative limitation, the rule as now declared in many cases has been applied, not only to officials judicial and quasi-judicial, but to executive officers generally, such as the Postmaster General, the Secretary and Assistant Secretary of the Treasury, Members of the United States Parole Board, the Parole Executive, the Warden of a Federal penitentiary, the Director of the Bureau of Prisons, the Commissioners of the District of Columbia, the Chairman of the Tariff Commission, a building inspector, the United States Commissioner of Indian Affairs, and the Chief of Record and Pension Office of the War Department.

"The reason now given for the rule is simply one of public policy." (At page 141).

"Appellant seeks to avoid the effect of this widespread extension of the rule by pointing out that in some of the cases the rule of immunity -- as applied to executive officers -- was limited to heads of departments. . . . During recent years, however, a trend is definitely observable extending the application of the rule to minor executive officers. It is obvious that the effect of this trend is to cut down proportionately the scope of the general rule which makes officials liable for tortious injuries and which denies to them the immunity of the sovereign. It may be argued that if this trend is allowed to prevail, it will too greatly imperil the rights of the individual citizen. Just as it is the 'hard-boiled top-sergeant' who -- in his interpretation of the orders of the high command -- makes life miserable for the private in the rear rank, so it is the comparable minor official who -- in civil life -- is largely responsible for long-existing impressions in the minds of private citizens concerning 'the insolence of office.'

"On the other hand, to hold that only the heads of departments should be immune from liability under the rule would

defeat its purpose. We know that heads of the Federal departments do not themselves engage in such activities as are here involved. Their administrative duties make such participation impossible. There must be, necessarily, delegation of authority for such purposes. When the act done occurs in the course of official duty of the person duly appointed and required to act, it is the official action of the department; and the same reason for immunity applies as if it had been performed by the superior officer himself. . . .To hold otherwise would disrupt the government's work in every department. 'Its head can intelligently act only through subordinates.' . . . The fact that our country has grown so great as to require a multiplication of governmental officials in some small measure proportionate thereto, cannot obscure the fact that the duties performed are the same as those once performed by heads of departments, and that fearless performance of official duty is as essential today as it was yesterday.

"Therefore, we conclude that as the acts of appellees were performed in the discharge of their official duties, the motives with which those duties were performed are immaterial, and appellant's contention must fail." (At page 142).

The Court's final ruling also included the statement that the immunity rule would apply whether the defendants were accused severally, jointly or in terms of a conspiracy, so long as each was proceeding within the scope of official duties.

See also: Laughlin v. Rosenman, 163 F.(2d) 838 (C.A. D.C., 1947) where the Court stated that:

> "The application of the rule of immunity cannot be avoided by the allegation of the plaintiff that the defendants are sued in their personal capacities."

The rule of absolute privilege as to heads of departments was extended on the authority of the De Arnaud, Farr, and Brunswick cases so as to reach and include subordinate government officials in the case of Harwood v. McMurtry, 22 F. Supp. 572 (D.C., W.D. Ky. 1938). The Court ruled that the rule -

> ". . .has been further extended so as to reach and include subordinate government officers when engaged in the discharge of duties imposed upon them by law. ✱ The seriousness of affording such protection, under the cover of which officers of the Government, under the guise of official duty, may make a false and malicious statement subjecting another to scorn and ridicule with ensuing damages, without the injured party being able to secure legal redress, cannot be doubted. These considerations, however, are held to be outweighed by an imperative public policy that perfect freedom in the discharge of public duty is essential to the maintenance of efficient public service and must be preserved without restraint." (At page 572).

However the Court points out that absolute privilege may be lost when the officer departs from official duty and indulges in irrelevant defamatory statements. The Court stated:

> "It is clearly pointed out that when an officer departs from official duty and indulges in defamatory statements, wholly irrelevant and foreign to its scope, he is not entitled to protection, but otherwise he is afforded absolute immunity. Improper motive, bad faith, or false

> statement of facts are not material questions for the reason that no liability arises on account thereof when involved in the exercise of official duty. . . .It is sufficient to say that the question appears to have been settled by the Supreme Court, and we are bound by the decision." (At pages 572 and 573).

In Block v. Sassman, 26 F. Supp. 105 (D.C., D. Minn, 1939) plaintiff sued some administrative personnel of WPA, charging defamation through falsely making an employment record of the plaintiff setting forth that she was quarrelsome and mentally incompetent, by reason of which she was ineligible to work on WPA projects. The Court pointed out that:

> "The very matter under consideration -- the development of the employment record of the plaintiff -- comprehends the exercise of the judgment and discretion of these defendants, who were in charge of the employment record of all employees. Officers in the status of these defendants should not be under any apprehension that the motives which control their actions may at some time subject them to a suit for damages. Such apprehension would seriously interfere with a fearless and effective administration of the office. . .
>
> "False and malicious statements made under the guise of official duty are condemned, but on the other hand, public policy and the public good require that official duties be performed without restraint, and that the motives underlying the performance of such official duties in matters of the kind under consideration should not be inquired into in a proceeding in a court of law. . . ." (At pages 106 and 107).

The Court dismissed the plaintiff's complaint.

Colpoys v. Gates, 118 F.(2d) 1¢ (U.S.C.A., D. C. 1941)

This was an act for libel by certain Deputy United States Marshals against the United States Marshal for publishing in the press statements explanatory of his dismissal of certain deputies. The case arose from the denial of the lower court of defendant's motion to dismiss the complaint on the grounds that the statements were privileged. The Court pointed out that United States marshals were neither cabinet officers nor were they policy-making officials. It was Colpoys' duty to investigate charges if any were made against his deputies. The Court stated:

> ". . .It was not his duty publicly to discuss the dismissal or publicly to explain the reasons for it. He had no duty to tell the public anything about them, unless possibly the bare fact that they were no longer on his staff. In the cases which have extended an absolute privilege to administrative officers without policy-determining functions, the thing held to be privileged has usually if not always been an act in the general line of duty, not a separate discussion or explanation. . . ." (At page 17).

Citing previous cases which established the rule for privilege, the majority of which have been discussed in this memorandum, the Court stated:

> ". . .Whether or not any of these cases went too far, we think they went far enough. Improbable as the present complaints may be, they charge appellant with knowingly broadcasting false statements about his former deputies for the purpose of injuring them. We agree with the District Court that such conduct by such an officer is not privileged." (page 17).